The Federal Election Commission
Washington, DC 20463

NOV 2 2006

William C Oldaker, Esq
N Bradley Litchfield, Esq
Oldaker, Biden & Belair, LLP
818 Connecticut Avenue, NW
Suite 1100
Washington, DC 20006

RE MUR 5517
Jim Stork for Congress, *et al*

Dear Sirs

Based on a complaint filed with the Federal Election Commission on August 20, 2004, and information supplied by your clients, James R Stork, Jim Stork for Congress and William C Oldaker, in his official capacity as treasurer ("the Committee"), Stork Investments, Inc d/b/a "Stork's Bakery" and Stork's Las Olas, Inc , on February 3, 2005 the Commission found that there was reason to believe your clients violated 2 U S.C § 441b of the Federal Election Campaign Act, as amended, and that the Committee also violated 2 U S C § 434

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that the above-referenced violations have occurred

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time All requests for extensions of time must be submitted in writing

five days prior to the due date, and good cause must be demonstrated In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement

Should you have any questions, please contact Ruth Heilizer, the attorney assigned to this matter, at (202) 694-1598

Sincerely,

Lawrence H Norton
General Counsel

Enclosure
Brief

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5517
James R Stork	)	
Jim Stork for Congress and William C Oldaker, in his official capacity as treasurer	)	
Stork Investments, Inc d/b/a "Stork's Bakery"	)	
Stork's Las Olas, Inc	)	

GENERAL COUNSEL'S BRIEF

I. INTRODUCTION

The Federal Election Commission ("Commission") found reason to believe that James R Stork, Jim Stork for Congress and William C Oldaker, in his official capacity as treasurer (the "Committee"), Stork Investments, Inc d/b/a "Stork's Bakery" and Stork's Las Olas, Inc (collectively, "Respondents") violated 2 U S C § 441b(a) when the corporations made, and the Committee received, prohibited corporate in-kind contributions Most of the contributions were in the form of coordinated communications as defined by 11 C F R § 109 21 [1] Some appeared to be contributions of food, rent, and office equipment that the bakeries allegedly provided without charge to Stork's campaign Finally, the Commission found reason to believe that the Committee violated 2 U S C § 434(b) by failing to report the in-kind corporate contributions

[1] The Commission recently revised its coordination regulations, the revised regulations became effective on July 10, 2006 *See* Explanation & Justification, *Coordinated Communications*, 71 Fed Reg 33198 (June 8, 2006) ("Revised Coordination E&J") The Factual and Legal Analysis in this case included a discussion of advertisements that ran within 120 days before the 2004 general election as well as the 2004 Florida primary election At the time relevant to this matter and prior to the revised coordination regulations, a public communication that referred to a clearly identified Federal candidate that was disseminated within 120 days before an election, and that was directed to voters in the jurisdiction of the clearly identified candidate, met the "content" standard for a coordination communication *See* former 11 C F R § 109 21(c)(4) and discussion *infra* In the case of communications that refer to House candidates, pursuant to the revised regulations at section 109 21(c)(4)(i), the period begins 90 days before each of the primary and the general elections and runs through the date of each election, respectively All of the advertisements in this matter ran within 90 days before the August 31, 2004 Florida primary, but none of them ran within 90 days before the November 2, 2004 general election Although the advertisements ran within the time-frame of the 2004 general election, as set forth in the then-prevailing law, and thus could be analyzed as coordinated communications, this Office has decided, in view of the revised regulations, to make its probable cause recommendations regarding the pre-primary period only

Based on the results of our investigation of these matters, this Office is prepared to recommend that the Commission find probable cause to believe that Respondents violated 2 U.S.C. § 441b(a) and that the Committee also violated 2 U.S.C. § 434(b).

II. THE BAKERY ADVERTISEMENTS WERE COORDINATED COMMUNICATIONS AND THEREFORE CONSTITUTED PROHIBITED CORPORATE IN-KIND CONTRIBUTIONS

A. Background

James R. Stork was a 2004 candidate for Congress in Florida's 22nd Congressional District. Stork owns Stork Investments, Inc. d/b/a "Stork's Bakery," located in Wilton Manors, Florida, and Stork's Las Olas, Inc., located in Fort Lauderdale, Florida ("the bakeries").[2] Response to Complaint ("Response") at 1. Prior to Florida's 2004 primary election, the bakeries paid for and ran two cable television advertisements, which cost a total of $99,265.48. *Id.*, *see also* Parsons-Wilson Invoice ("Invoice") attached to Respondents' Discovery Response. The advertisements, which ran in portions of Florida's 22nd Congressional District, including Fort Lauderdale, Pompano Beach, Boca Raton, and Delray Beach, featured Stork holding a bakery product and stating, "I'm Jim Stork. Come find out why Stork's Bakery and Café means quality you can trust." Response at 2, *see also* Exhibit 1 to Complaint (videotapes of the bakeries' cable television advertisements). These advertisements were broadcast between June 29, 2004 and July 18, 2004, or between 43 to 62 days before Florida's August 31, 2004 primary election. *See* Respondents' Letter to the General Counsel ("Stork Letter").

During the investigation, we discovered that the bakeries also paid $10,734.36 to the same vendor for approximately 25,500 pieces of direct mail advertising Stork's Fort Lauderdale bakery. *See* Invoice. These double-sided mailers, which were disseminated on or about June 21, 2004

[2] Corporate documents for Stork Investments, Inc. list Stork as "president," corporate documents for Stork's Las Olas, Inc. list Stork as an "officer/director."

through the end of July 2004, included photographs of Stork on both sides, under which his name was printed. *See* Exhibits A through D attached to Respondents' Discovery Response. As was the case with the cable television advertisements, the Stork mailers were disseminated within Florida's 22nd Congressional District between 30 to 71 days before Florida's primary election. *See* Invoice, *see also* Stork Letter. According to the Invoice, the combined cost of the cable and direct mail advertising campaign was $109,999.84 plus $1,760 in allocated "agency fees and expenses," for a total cost of $111,759.84. The Committee failed to report the costs of these advertisements in any manner.

B. Analysis

Under the Federal Election Campaign Act of 1971, as amended (the "Act"), corporations may not make contributions in connection with a Federal election and corporate officers may not consent to such contributions. 2 U.S.C. § 441b(a). Moreover, Federal candidates and political committees may not knowingly accept or receive such contributions. *Id.* The term "contributions" includes in-kind contributions, 11 C.F.R. § 100.52(d)(1), as well as expenditures made "in cooperation, consultation, or concert, with, or at the suggestion of, a candidate, his authorized political committees, or their agents." 2 U.S.C. §§ 431(8)(A)(i), 441a(a)(7)(B).

Following the enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), the Commission promulgated a new "coordinated communications" regulation at 11 C.F.R. § 109.21, which implements section 441a(a)(7)(B) through a three-pronged test set forth at 11 C.F.R. § 109.21(a)(1)-(3).

- the communication must be paid for by a person other than a Federal candidate, a candidate's authorized committee, or political party committee, or any agent of any of the foregoing (the "payment source" prong at 11 C.F.R. § 109.21(a)(1)),

- one or more of the four "content" standards set forth in 11 C.F.R. § 109.21(c) must be satisfied. Under one of them, 11 C.F.R. § 109.21(c)(4), a communication satisfies

the "content" standard if it is a public communication that (i) refers to a political party or clearly identified candidate for Federal Office, (ii) is disseminated within 120 days before an election, and (iii) is directed to voters in the jurisdiction of the clearly identified candidate, and

- one of the "conduct" standards set forth at 11 C F R §§ 109 21(d)(1)-(6) must be met, including 11 C F R § 109 21(d)(2), which provides that when a candidate is "materially involved" in decisions regarding a communication, the "conduct" standard is satisfied

The bakeries' advertisements and mailers (collectively, "advertisements") satisfy all three prongs of the "coordinated communications" test applicable at the time of the conduct, *see* n 1 First, the bakeries, not candidate Stork, paid for them, thus satisfying the "payment source" prong of the coordination test at 11 C F R § 109 21(a)(1) (communications paid for by a person other than the candidate or candidate's committee) Second, they constitute "public communications" because they were either distributed "by means of any broadcast, cable, or satellite communication" or disseminated "by means of a mass mailing of more than 500" similar pieces of mail 11 C F R §§ 100 26 and 100 27 In addition, the bakeries aired and disseminated the advertisements, in which Stork's name and image appeared, in Florida's 22nd Congressional District, within 120 days before Florida's primary election, thus satisfying the "content" standard prong at 11 C F R § 109 21(c)(4)

Third, Stork, who owns the bakeries and whose image and name appeared in the advertisements, was "materially involved" with them, thus satisfying the "conduct" requirement at 11 C F R § 109 21(d)(2) *See* Advisory Opinions 2004-1 and 2003-25 (Commission stated that a candidate's appearance in a communication would be sufficient to conclude that the candidate was materially involved in decisions regarding that communication) Thus, the advertisements were coordinated communications that constituted prohibited in-kind corporate contributions made by the bakeries, consented to by Stork, and accepted and not reported by the Committee

The advertisements' ostensible appearance as commercial advertisements for Stork's businesses may mitigate, but does not erase, their status as coordinated communications. Stork appears in both the cable and print advertisements, and they were distributed within his congressional district within 120 days before the primary election, they therefore have the requisite content. The goal of the content standard was to establish a bright line test requiring "as little characterization of the meaning or the content of the communication, or inquiry into the subjective effect of the communication on the reader, viewer, or listener as possible." Explanation & Justification, *Coordinated and Independent Expenditures*, 68 Fed. Reg. 421, 430 (Jan. 3, 2003). There is no "commercial exemption" in the coordinated communications regulations, and application of the bright line test is appropriate in this matter. Moreover, any mitigation that might flow from the advertisements' ostensible commercial purpose is limited. Stork's incorporated businesses spent almost $100,000 to run cable television advertising in his district within 120 days before the primary election, which prominently featured him and equated his business and name with "quality you can trust," and more than another $10,000 on mailings with his picture and name.[3]

Similarly, it makes no difference to Respondents' liability that Stork was unopposed in the primary election. The Commission considers coordinated contributions, like any other undesignated contributions, to be made in connection with "... the next election for that Federal office after which the contribution is made." 11 C.F.R. § 110.1(b)(2)(ii). "Elections," in turn, are defined as the "process by which individuals, either opposed or unopposed, seek [] election to ... Federal office," 11 C.F.R. § 100.2, section 100.2(c)(5) further states that, for major party candidates

[3] This is not the first case where the Commission has found advertisements run by a candidate's incorporated business to be coordinated expenditures. *See* MUR 3918 (Hyatt for Congress) and MUR 4999 (Bernstein), two "coordinated communications" cases decided before BCRA was enacted. These MURs involved inquiries into the background and creation of the communications at issue, whereas the post-BCRA coordination rules, in contrast, do not require such an inquiry.

whose nominations are unopposed, the primary election is considered to have occurred on the date on which that party's state primary election is held, which, in Stork's case, was August 31, 2004

This conclusion does not contradict the Commission's position before the Court of Appeals in *Shays v FEC*, 337 F Supp 2d 28, 56-66 (D D C Sept 18, 2004), as Respondents argued subsequent to the reason to believe findings In *Shays*, the District Court effectively struck down as *ultra vires* the entire content prong of 11 C F R § 109 21 Before the Court of Appeals, the Commission argued, among other things, that the District Court's reasoning would make any coordinated communications, and not just those featuring an "election, candidate, or political issue," into a contribution Appellate Brief for the Federal Election Commission (C A D C Feb 4, 2004) ("FEC Brief") at 30 As a result, the Commission argued, the District Court's argument would "extend the statute" to purely commercial advertisements for a candidate's business " *Id* Respondents argue that is exactly what we are doing here To the contrary, the Commission's Brief in *Shays* merely made the point that without any content standards (such as the time limitation), the coordination provisions of the Act would apply to *all* advertisements for a candidate's business, including those run at *any* time of *any* year, even if they made no reference to the candidate at all In this case, Stork personally appeared in the cable television advertisements, which ran within 43 to 62 days before the August 31, 2004 primary election, and his photograph and name were also featured in the printed advertisements, which were disseminated approximately 30 to 71 days before the primary election.

III. THE COMMITTEE IMPROPERLY REPORTED CANDIDATE ADVANCES

A. Background

The Commission found reason to believe that Stork's bakeries made corporate contributions to Stork's campaign, in the form of in-kind contributions, for items such as food, rent, and office

and catering expenses We determined, however, that Stork, not the bakeries, made the reported in-kind contributions, amounting to approximately $12,613 Stork submitted a sworn declaration averring that the reported in-kind contributions for "rent," totaling $5,100, represented the value of space in two of his residential properties Declaration dated August 4, 2005 at 2 He explained that he had allowed his campaign to use his residences without charge, which candidates are allowed to do *See* Explanation & Justification, *Personal Use Regulations*, 60 Fed Reg 7862, 7865 (Dec 13, 2002) The remaining $7,513 in reported in-kind contributions represented items such as food Stork purchased from the bakeries, rental office equipment, catering expenses, and travel and subsistence costs associated with the Stork campaign that Stork paid for himself

During our investigation, however, Stork revealed that he had made additional in-kind contributions that were not originally reported, and he provided supporting documentation about these contributions He maintains that he intended most of the in-kind contributions that he made to his campaign—both the approximately $10,000 that were not originally reported as in-kind contributions and the $7,513 that were—to be advances to his committee In his sworn declaration, Stork states "I made numerous payments for a variety of campaign purposes from my personal funds, or by means of incurring charges on my personal visa [sic] credit card These payments were intended to be advances or loans to my committee for which I expected to be repaid at the end of the campaign if my committee had sufficient funds " Declaration dated August 4, 2005 ("Declaration") And, in fact, after Stork ended his campaign, the Committee reimbursed him $17,901 30 for various expenses In Schedule B of its 2004 October Quarterly Report, the Committee reported the reimbursements as follows $418 65 for "Reimbursement--cell phone," $2,193 09 for "Reimbursement-computer," $300 for "Reimbursement—event tickets, "$212 67—

field staff food," $1,271 30 for "Reimbursement—office supplies" and $13,505 59 for "Reimbursement—travel," for a total of $17,901 30

B. Analysis

Although candidates may make unlimited contributions to their own campaigns, 11 C F R. § 110 10(a), including advances, the contributions must be properly reported *See* 2 U S C § 434(b) If candidates are going to make contributions that they intend to be advances, they generally need to report them in memo entries on Schedule A as in-kind contributions, identify them as "advances," and continue reporting them as debt on Schedule D until repaid 11 C F R § 116 5(b) In addition, debts exceeding $500 or debts of any amount that have been outstanding for more than 60 days must be reported on Schedule D 11 C F R §§ 104 11, 116 5(c)

The rules provide an exception for travel and travel-related subsistence expenses if certain conditions are met Specifically, such expenditures are not considered to be reportable contributions if, *inter alia*, payment is made with a credit card and is reimbursed within 60 days of the closing date of the billing statement on which the charges appear 11 C F R § 116 5(b)(2) Otherwise, travel and subsistence advances are in-kind contributions, and must be reported the same way as are other contributions, and if they are intended to be advances, they must be reported the same way as other advances

The Committee violated the Act and regulations here in two ways First, as Stork now admits, it failed originally to report at all on Schedule A approximately $10,000 in in-kind contributions from the candidate Second, the Committee failed to properly report any of the $17,903 30 reimbursed to Stork that he now claims were intended as advances, even those that were originally reported as simple in-kind contributions None were originally reported as intended advances, although they were reimbursed more than 60 days after the debts were incurred and thus

were not exempt from the Commission's reporting requirements, nor were they carried as debts to the candidate on Schedule D The Committee's 2004 October Quarterly Report and the documentation provided indicate that most of the claimed advances were for travel and subsistence expenses Stork's last campaign travel expense was a fundraising trip on June 28, 2004, for which Stork incurred hotel charges of $421 84 This expense is listed on Stork's credit card's July 2004 billing statement, which has a closing date of July 12, 2004 As none of Stork's travel and travel-related subsistence expenses were reimbursed until September 28, 2004, and since the latest of these expenses was billed to a credit card with a closing date of July 12, 2004, none of the expenses were reimbursed within 60 days and therefore did not qualify for the reporting exemption Thus, the travel and travel-related subsistence expenses were reportable contributions and should have been disclosed as such

Accordingly, for the foregoing reasons, this Office is prepared to recommend that the Commission find probable cause to believe that James R Stork, Jim Stork for Congress and William C Oldaker, in his official capacity as treasurer, Stork Investments, Inc d/b/a "Stork's Bakery" and Stork's Las Olas, Inc violated 2 U S C § 441b(a), and that Jim Stork for Congress and William C Oldaker, in his official capacity as treasurer, also violated 2 U S C § 434(b)

IV. GENERAL COUNSEL'S RECOMMENDATIONS

1. Find probable cause to believe that James R Stork violated 2 U S C § 441b(a)
2. Find probable cause to believe that Stork Investments, Inc d/b/a "Stork's Bakery" violated 2 U S C § 441b(a)
3. Find probable cause to believe that Stork's Las Olas, Inc violated 2 U S C § 441b(a)

4 Find probable cause to believe that Jim Stork for Congress and William C Oldaker, in his official capacity as treasurer, violated 2 U S C §§ 434(b) and 441b(a)

11/2/06
Date

Lawrence H Norton
General Counsel

Lawrence L Calvert, Jr
Deputy Associate General Counsel

Susan L Lebeaux
Assistant General Counsel

Ruth I Heilizer
Attorney